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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA

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May 1, 1987

QUESTIONS PRESENTED

1. Are the Fourteenth Amendment's guarantee of the due process of law, and the Sixth Amendment's guarantee of the effective assistance of counsel, violated when counsel, in the appeal from a capital conviction, fails to assert the undoubted falsity and unconstitutionality of crucial evidence on which his client's sentence of death rests?

2. Are the Fourteenth Amendment's guarantee of the due process of law, and the Sixth Amendment's guarantee of the effective assistance of counsel, violated when counsel, during the guilt phase of a capital trial, fails to object, rebut, or otherwise respond to the prosecutor's repeated assertions in closing argument that the defendant is a multiple murderer, when there is no record evidence to support those assertions?

3. Is the Sixth Amendment's guarantee of the right to confront and cross-examine witnesses violated when, at a resentencing hearing for a capital crime, the prosecution has actors read to the jury a transcript reflecting the adverse testimony of witnesses given at an earlier penalty phase, before a different jury, without demonstrating that those witnesses are unavailable to testify in person?

4. Is the Fourteenth Amendment's guarantee of the due process of law violated by the refusal of a state court trial judge to recuse himself from hearing a petition for a writ of habeas corpus when the petition's principal assertion is that a lawyer who had served as that judge's long-time courtroom clerk provided petitioner ineffective assistance during a capital proceeding?

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Wilbert Lee Evans petitions for a writ of certiorari to review the decision of the Circuit Court of Alexandria, Virginia, entered in this case.

OPINIONS BELOW

The Circuit Court of Alexandria, Virginia, per Judge Kent, dismissed by summary order, without hearing or opinion, most of the claims raised in Petitioner Evans' Petition for a Writ of Habeas Corpus. The court's order, which is unreported, is set forth in the Appendix ("App.") at 1a-2a. The court held an evidentiary hearing on three of Evans' claims in December 1985, and then dismissed them in a letter opinion issued on May 19, 1986 (App. 3a-13a), and an order issued on June 3, 1986. (App. 14a-15a). Evans timely appealed from both orders, and the Supreme Court of Virginia denied review, in a summary order issued on February 26, 1987. (App. 16a).

Evans' habeas corpus petition challenged his 1981 conviction of capital murder and death sentence. The Virginia Supreme Court had earlier upheld both the conviction and sentence in an opinion issued on December 4, 1981, *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981) (App. 17a-31a), and this Court denied review, 455 U.S. 1038 (1982) (*"Evans I"*). Thereafter, Petitioner's habeas counsel discovered, and the Commonwealth confessed, that the prosecution had knowingly and deliberately introduced false and unconstitutional evidence at Evans' capital sentencing, and that this same tainted evidence had been cited before the Virginia Supreme Court and this Court as the basis for affirming Evans' death sentence. *See Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (App. 32a-46a), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*). With the Commonwealth conceding that Evans' death sentence could not "be sustained" (App. 47a), the trial court vacated that sentence; over Evans' objections, a new sentencing hearing was held, and Evans was resentenced to death. The Virginia Supreme Court affirmed Evans' second death sentence, *Evans II*, 323 S.E.2d 114 (1984) (App. 32a), and this Court denied certiorari, over a lengthy dissenting opinion by Mr. Justices Marshall and Brennan, 471 U.S. 1025 (1985) (*"Evans II"*).

JURISDICTION

The Order of the Circuit Court of Alexandria, Virginia, denying Evans' Petition for a Writ of Habeas Corpus was entered on June 3, 1986. (App. 14a-15a). The Order of the Supreme Court of Virginia denying review of Petitioner's appeal was entered on February 26, 1987. (App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth separately at the end of this volume.

STATEMENT OF THE CASE

Preliminary Statement

The stark fact of this case is that if Petitioner's court-appointed counsel had rendered effective assistance on appeal from the 1981 death sentence, Petitioner would not be facing the death penalty today. Petitioner Evans was sentenced to death on the basis of evidence which the Commonwealth of Virginia has acknowledged was known to have been false at the time of its introduction. The prosecuting attorney has since maintained under oath that during the penalty phase of Evans' trial, he alerted Evans' counsel to the infirmities in the Commonwealth's evidence, but that counsel failed to object to its use. Independent, unimpeachable evidence demonstrates that by the time Evans' sentence was imposed and throughout the course of his appeals, defense counsel knew or should have known that Petitioner's capital sentence rested on false evidence. Yet during the lengthy period following Evans' conviction and death sentence, defense counsel failed to correct the record or to challenge the tainted evidence, even as the Commonwealth was citing that evidence in successfully urging the Virginia Supreme Court to affirm Evans' death sentence, and this Court to deny review. The record also demonstrates that counsel's failure caused Evans lasting prejudice: if defense counsel had challenged the Commonwealth's tainted evidence at any time during the course of Evans' appeals, Evans' death sentence would necessarily have been vacated (as indeed it later was); and under Virginia law as it existed at the time, the Commonwealth would have been barred from seeking a second capital sentence.

This extraordinary confluence of events—involving admitted misconduct by the prosecutor, and demonstrable ineffectiveness by defense counsel—creates an opportunity for this Court to instruct the lower courts on the scope of the constitutional rights recently articulated by this

Court in *Evitts v. Lucey*, 469 U.S. 387 (1985). In addition, this case presents other important constitutional questions as to which the lower courts require guidance.

The constitutional errors raised in the instant petition occurred during Evans' trial and sentencing, first appeal, resentencing, and state habeas corpus proceeding, as discussed below.

The Guilt Phase of Evans' Trial

In January 1981 Petitioner Wilbert Evans was arrested, and later indicted, for capital murder[1] in the shooting death of Deputy Sheriff William Truesdale of the Alexandria, Virginia Sheriff's Department. The trial judge appointed as Evans' counsel two Virginia attorneys, Messrs. Brown and Long; they represented Evans at trial, and throughout his first appeal and certiorari petition.

The undisputed evidence at trial showed that in January 1981 Petitioner Evans was incarcerated in North Carolina, on charges unrelated to this proceeding. At the request of Virginia authorities, he was transferred to the City Jail, in Alexandria, Virginia, to testify as a witness at a hearing scheduled for January 27, 1981. Evans spent the night of January 26, 1981 at the Alexandria City Jail and appeared in court the next day. Following his court appearance, while Evans was being escorted back to jail by Deputy Sheriff William Truesdale, Evans seized Deputy Truesdale's service revolver and attempted to escape. A struggle ensued between Evans and Deputy Truesdale, and the weapon discharged, inflicting a wound from which the Deputy later died.

That Evans had shot Deputy Truesdale while attempting to escape was undisputed; Evans' trial focused in-

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[1] The Virginia Code defines capital murder as "the willful, deliberate and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties." Virginia Code § 18.2-31(f) (1982).

stead on whether the shooting had been accompanied by the premeditation required to make the act capital murder under Virginia law. The prosecution's theory was that Evans had planned his escape attempt in advance and had intended, because of the length of prison time he believed he faced in North Carolina, to carry it out at all costs. To prove this, the prosecution introduced testimony from three inmates, including Washington and Jasper, who had been incarcerated with Evans on the night before the shooting. They testified that Evans had told them that he was facing life imprisonment in North Carolina and had "nothing to lose" by attempting to escape.[2] This inmate hearsay testimony was admitted with cautionary instructions from the court that the statements could not be considered "to prove whether or not [Evans] is facing a sentence in North Carolina or anything concerning his legal situation in the State of North Carolina." (App. 55a; *see id.* 53a).

Testifying in his own defense, Evans denied making such statements. He asserted that his escape attempt was unplanned, and that he had shot Deputy Truesdale accidentally while attempting to shoot off his handcuffs.[3]

In closing argument, the prosecutor emphasized Evans' supposed belief that he had "nothing to lose" in planning and carrying out an escape. In an apparent reference to the testimony of inmates Washington and Jasper, the prosecutor twice told the jury that Evans had said that

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[2] Ralph Washington, one of the inmates, testified that Evans had said that "he was already facing life and he ain't got nothing to lose. [Evans] said he was going to try any means possible to escape." (App. 53a). The other inmate, Anthony Jasper, testified that Evans had said "he ain't got nothing to lose . . . . [H]e had two life sentences, something like that." (App. 55a).

[3] In fact, with a second shot from Deputy Truesdale's weapon, Evans did successfully sever his handcuffs. He escaped on foot but, within minutes, was recaptured.

he had "killed people in North Carolina." [4] In fact there was no evidence before the jury that Evans previously had either killed anyone (for in fact, he had not) or had said that he had killed anyone, in North Carolina or elsewhere. Although the prosecutor's summation created the false impression that Evans was by his own admission a multiple murderer, Evans' counsel failed either to object to the summation, to seek a curative instruction from the court, or to offer rebuttal in closing argument. Thereafter, the jury found Evans guilty of capital murder.

Penalty Phase and Sentencing

The penalty phase of Evans' trial was strikingly short.[5] The Commonwealth presented one witness, Officer Pugh, and three documentary exhibits (Commonwealth Exhibits 19-21). Evans' defense counsel presented no evidence at all.[6]

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[4] The prosecutor stated:

> "We start out with motive. And why would Wilbert Evans come up here to escape and why would he go to the extent of killing someone to do it? Two witnesses said he had nothing to lose; he'd killed people in North Carolina; he'd absolutely nothing to lose. He was going to escape, no matter what. . . . He would go to any extent not to go back to North Carolina . . . ."

(App. 56a).

> "Did he have motive, bias? I'll tell you he had all the motive and bias; he's facing the death penalty. He told people he killed people and was facing life imprisonment in North Carolina."

(App. 56a).

[5] The entire proceeding, including a long bench conference, one recess, and jury argument, lasted 45 minutes.

[6] Although counsel's failure to present any evidence during the critical capital sentencing phase is not at issue here, that failure is illustrative of the quality of representation Evans received throughout from his court-appointed counsel.

The Commonwealth sought the death penalty on the basis of the statutory aggravating factor, that there was a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." Virginia Code § 19.2-264.2(1) (1983). The heart of the prosecution's presentation was the three documentary exhibits purportedly reflecting Evans' prior conviction record. The exhibits showed convictions for seven criminal offenses, one of which was "[a]ssaulting a police officer with a knife while the officer was in the performance of his duties." (App. 47a). *See Evans I*, 284 S.E.2d at 820 (App. 24a). Defense counsel did not challenge the validity of any of the convictions listed in these exhibits, and they were admitted into evidence. The jury found the statutory aggravating factor of "future dangerousness" and voted, on April 17, 1981, to impose the death penalty. On that day the jury was dismissed.

The trial court imposed sentence on June 1, 1981. Before doing so, the court reviewed and received a presentence report prepared by the Commonwealth's Probation Department. (App. 57a-60a). Defense counsel acknowledged having received and read the report, and that they had "had sufficient time to review it." (App. 62a). The pre-sentence report showed that the most serious charge in Commonwealth Exhibit 21—"Assault on Officer/Affray with a Deadly Weapon"—had been *nolle prossed*. (*See* App. 58a). Despite this fact, defense counsel voiced no objection to the report, and in particular did not indicate that the report had altered the understanding of Exhibit 21 which counsel had had at the time of trial. After testimony by an officer from the Probation Department and argument by counsel, the trial judge imposed sentence of death.

Two years later, the Commonwealth confessed that Exhibits 19-21 were " 'seriously misleading' " and that it was constitutional error to have admitted them at the penalty phase of Evans' trial. (App. 48a). *See Evans*

II, 323 S.E.2d at 117 (App. 34a).[7] In an evidentiary hearing held on September 21, 1983, the original prosecutor, Mr. Kloch, testified that he had told Evans' counsel about some of the inaccuracies in Commonwealth Exhibits 19-21 immediately prior to closing arguments at the April 1981 sentencing proceeding. (App. 64a-72a). Kloch testified that Evans' counsel "just took [the disclosure of inaccuracies] as a matter of course . . . . There was no surprise or shock or anything of that nature." (App. 70a). According to Kloch, defense counsel said "[j]ust leave [the erroneous convictions] in there and we'll tell the jury about it." (App. 72a).[8] In fact, Evans' counsel neither told the jury about the inaccuracies in Commonwealth Exhibits 19-21, nor moved to strike the exhibits.

First Appeal

Represented by Messrs. Brown and Long, Evans took an automatic appeal as of right from his conviction and death sentence. Evans' brief to the Virginia Supreme

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[7] The most serious of the convictions depicted in the Commonwealth's Exhibits—"assaulting a police officer with a knife while the officer was in the performance of his duties"—was not a conviction at all but only reflected an indictment that had later been *nolle prossed*. Another "conviction" had been dismissed on appeal, and two others simply represented earlier and later stages of court proceedings relating to a single offense. Moreover, of the seven "convictions," no less than five had been obtained while Evans was without benefit of counsel, and thus could not lawfully have been used in a subsequent proceeding for any purpose, much less as the foundation for a death sentence. *See, e.g., Baldasar v. Illinois*, 446 U.S. 222 (1980). *See* Letter of Jerry Slonaker to the Honorable W.R. Wright, Jr., April 12, 1983 (App. 47a-50a); *Evans II*, 323 S.E.2d at 117, 120 (App. 34a-35a, 39a-40a); *Evans II*, 471 U.S. at 1026 (Marshall, J., dissenting from denial of certiorari).

[8] Although Evans' counsel denied knowledge of the flaws in Exhibits 19-21 (App. 74a, 78a), the Commonwealth has long urged that its prosecutor, Mr. Kloch, explicitly informed Evans' defense counsel of the errors in Exhibits 19-21, and that counsel failed to act on that information. *See* Commonwealth Brief in *Evans II*, Record No. 840474, at 4-5, 25-29 (filed July 6, 1984) (App. 80a-85a).

Court did not challenge the conviction records (Commonwealth Exhibits 19-21) proffered by the Commonwealth as the basis for Evans' death sentence. The Commonwealth's brief in opposition, filed on September 4, 1981, specifically recited Evans' purported convictions—including the charge of aggravated assault on a police officer that had actually been *nolle prossed*—to support the jury's finding of future dangerousness. (App. 87a-89a). The Supreme Court of Virginia, explicitly relying on several of the non-existent "convictions," affirmed Evans' death sentence in an opinion issued on December 4, 1981. *Evans I*, 284 S.E.2d at 820, 823-24. (App. 24a, 29a-31a).

Still represented by Brown and Long, Evans petitioned this Court for certiorari review. Again, Evans' petition failed to challenge the false conviction records. The Commonwealth opposed the petition, once again citing Evans' purported conviction records (App. 91a), which the Commonwealth's trial counsel later acknowledged were known to have been false. (App. 65a-67a). On March 22, 1982, this Court denied review. *Evans I*, 455 U.S. 1038 (1982).

The Patterson Decision

On October 16, 1981, while Evans' direct appeal was pending before the Virginia Supreme Court, that court ruled in another case that when a capital defendant's right to a fair and impartial jury is violated during the sentencing phase of a trial, a death sentence must be commuted to life imprisonment. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). The Virginia Court premised its decision on a construction of the then-existing death penalty statute in Virginia, under which only the jury that found a capital defendant guilty could fix his punishment. Because the original jury in *Patterson*, tainted by constitutional error, could not be reconvened to resentence the defendant, the court ruled that Patterson's death sentence had to be reduced automati-

cally to life imprisonment. *Id.*, 283 S.E.2d at 216. *See also Evans II*, 323 S.E.2d at 116-17. (App. 33a). The *Patterson* ruling was in effect throughout Evans' direct appeal to the Virginia Supreme Court, and his first certiorari petition to this Court. *Patterson* remained in effect until March 28, 1983, when Virginia enacted emergency legislation amending its death penalty statute. The new amendment prospectively overturned *Patterson* by permitting resentencing before a new jury in capital proceedings, when the original sentencing jury's determination was later set aside or found invalid.[9]

Resentencing

Shortly before his scheduled execution, Evans obtained new counsel, who promptly discovered the constitutional infirmities in the exhibits by which Evans' death sentence had been obtained. In April 1982 counsel filed a petition for a Writ of Habeas Corpus in the Circuit Court of Alexandria, Virginia. The petition was amended in May 1982 to attack explicitly the purported conviction records presented by the Commonwealth. *See Evans II*, 323 S.E.2d at 117. (App. 34a). After resisting Evans' petition and delaying for nearly a year—while the Virginia legislature amended its death penalty statute to permit resentencing in capital cases—the Commonwealth's Attorney General conceded that Evans' death sentence could not "be sustained." (App. 34a-35a, 47a).[10] Thus, the trial

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[9] Virginia amended section 19.2-264.3 of its Code to provide that "[i]f the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty." Virginia Acts 1983, ch. 519 (March 28, 1983). *See Evans II*, 323 S.E.2d at 117. (App. 34a).

[10] The emergency legislation amending Virginia's death penalty statute passed the Virginia legislature and was signed by the Governor on March 28, 1983. *On that day* the Commonwealth's Assistant Attorney General informed Evans' counsel that the Commonwealth intended to concede error. The Commonwealth's formal concession of error was made in writing on April 12, 1983 (App.

court granted portions of the habeas petition and vacated Evans' death sentence.

Over Evans' objections, a resentencing hearing was held on January 31-February 2, 1984.[11] At that hearing, the Commonwealth arranged for actors to read portions of the transcript from Evans' 1981 trial. The reading included the crucial hearsay testimony of three inmate witnesses concerning statements allegedly made by Evans on the night before the shooting.[12] None of these inmate witnesses appeared live before the resentencing jury, though it is likely that all were within state custody and

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47a)—less than three weeks after amendment of the statute, and exactly two years after the Commonwealth had introduced at Evans' capital sentencing the evidence which, by the Commonwealth's own admission, it knew was false.

[11] This hearing, which could not have occurred under the law in effect at the time of Evans' conviction, sentencing or appeal, was ordered over Evans' objections that retroactive application of the new law violated the Constitution's proscription against ex post facto laws, U.S. Const. art. I, § 10, cl. 1, and deprived him of rights guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See Evans II*, 323 S.E.2d at 117-22 (App. 35a-44a); *id.*, 471 U.S. at 1027-29 (Marshall, J., dissenting from denial of certiorari).

[12] At the resentencing hearing, Evans' counsel objected to specific portions of the 1981 transcript testimony, including portions of the inmate testimony, which the Commonwealth sought to introduce. The trial court overruled those objections, stating:

> Mr. Howard [counsel for Evans], as I have indicated to you earlier, it's not my intention to go through this entire transcript and give you an opportunity to make an objection or objections that you think counsel should have made during the course of the initial trial, and that's what you are seeking to do now.

(App. 95a). Evans' counsel, however, did not at that time object to the use of the 1981 transcript on the precise ground raised here: that it violated Evans' rights under the Sixth Amendment's Confrontation Clause. That constitutional claim was first raised in Evans' third amended state habeas petition, filed on May 14, 1985. *See infra* note 14.

could have been produced at the resentencing. In any event, the prosecutor made no showing that the witnesses were unavailable. The second jury recommended the death penalty, which the court imposed on March 7, 1984.

The Habeas Proceeding Below

Following his second death sentence, Evans filed a third amended petition for a writ of habeas corpus. In it he alleged, *inter alia*, that his court-appointed counsel, Brown and Long, had failed to provide effective assistance during his trial, first appeal, and first certiorari petition. The Honorable Donald Kent of the Circuit Court of Alexandria, Virginia, was assigned to hear Evans' third amended petition.[13]

In a summary order and without hearing, Judge Kent dismissed most of the claims in Evans' petition. (App. 1a). These included Evans' claim that he had been denied the effective assistance of counsel during the course of his first appeal, in that his counsel at the time had failed to discover or alert the court (including this Court) to the fact that Evans' death sentence had been obtained and defended on the basis of false evidence.[14]

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[13] Evans' habeas corpus petition presented the first three of the four issues presented here (*see* Sections I-III, below). The fourth issue (Section IV, below) was timely raised by motion, as discussed below. In its Answer, the Commonwealth moved to dismiss, without hearing, two of the claims (concerning ineffective assistance of counsel on appeal, and defects in the resentencing proceeding) at issue here; as to the third (concerning ineffective assistance at trial), the Commonwealth agreed to a plenary hearing. The Commonwealth separately opposed Evans' recusal motion (discussed in Section IV, below).

[14] Judge Kent's summary order also dismissed Evans' Confrontation Clause claim (claim VI, in the third amended habeas petition) concerning Virginia's rule permitting the use of prior transcript at the resentencing hearing. (App. 1a). The Commonwealth has asserted below, before the habeas judge and the Virginia Supreme Court, that this claim is barred by a procedural default under state law, because Evans did not object to the use

In the same order, Judge Kent set for plenary hearing three of Evans' claims, including the claim that counsel had provided ineffective assistance at trial by failing to

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of the prior transcript at the time of his resentencing. That assertion is erroneous. The Commonwealth sought dismissal of Evans' claim both on state procedural grounds, and on the federal constitutional merits. (*See* App. 98a-99a). As to the latter, the Commonwealth stated in its Answer to Evans' habeas petition:

> Furthermore, use of the transcript did not violate petitioner's constitutional rights. Petitioner had the opportunity to confront and cross-examine the witnesses in question at the time they originally testified [*i.e.*, at the guilt phase of his 1981 trial]. The Supreme Court of Virginia has approved such use of the transcript from the guilt stage of a trial when a defendant's death sentence is vacated and the case is remanded for a resentencing proceeding. [citing *Fogg v. Commonwealth*, 207 S.E.2d 847, 850 (1974), and other cases].

(App. 98a-99a). In granting the Commonwealth's request to dismiss this claim, the habeas court adopted the Commonwealth's reasoning, without making clear whether its ruling rested on the substantive or procedural ground urged by the Commonwealth. The court stated: "The Court finds for the reasons stated in the respondent's [*i.e.*, the Commonwealth's] answer that the petitioner is not entitled to the relief sought as to the remainder of his claims." (App. 1a).

When Evans presented the same federal constitutional claim to the Virginia Supreme Court, the Commonwealth again opposed it on both procedural and substantive grounds, in language identical to that used before the habeas court. (App. 101a-102a). The Virginia Supreme Court denied review, finding that "there is no reversible error in the judgment complained of." (App. 16a).

Although a state court finding that a state procedural bar precludes review of the merits may, in appropriate cases, constitute a bar to federal habeas review (absent a showing of "cause" and "prejudice"), *see Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the mere possibility that the state court applied a state procedural bar will not suffice to oust federal jurisdiction. To the contrary, this Court has held that "the state court must *actually* have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (citing *Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979) (emphasis added)). In this case it is impossible to tell whether either of the two state courts that reviewed Evans' Confrontation Clause claim

object to the inflammatory misstatements in the prosecutor's summation.

In preparing for the habeas hearing, Evans' present counsel discovered that E. Blair Brown—who had represented Evans at trial and on appeal and whose effectiveness was a central issue in the habeas petition—had been Judge Kent's courtroom clerk from 1974 through 1977. Because it was anticipated that Mr. Brown would be a principal witness at the evidentiary hearing, and because Mr. Brown's conduct was a principal focus of the inquiry, Evans timely requested that Judge Kent recuse himself. The Judge denied the motion orally by telephone, on December 6, 1985. The motion was renewed at the evidentiary hearing, and again denied. (App. 104a-105a).

An evidentiary hearing was held on December 16, 1985. During the hearing counsel were permitted to explore the relationship between Judge Kent and Mr. Brown. Brown testified that he had served as deputy court clerk in the Circuit Court of Alexandria (and the predecessor court) from 1972 through May 1977. (App. 106a). During this period Mr. Brown typically spent two days each week working in the courtroom. (App. 106a). From approximately 1974 through May 1977 Mr. Brown served as Judge Kent's courtroom clerk. (App. 108a). Although Mr. Brown assisted the other judges of the court as well,

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found it barred on procedural grounds. What is certain is that neither decision below "contains [a] clear or express indication that 'separate, adequate, and independent' state-law grounds were the basis for the Court[s'] judgment." *Caldwell v. Mississippi*, 472 U.S. at 327 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Thus, "the most reasonable explanation [of the decisions below is] that the state court[s] decided the case the way [they] did because [they] believed that federal law required [them] to do so." *Michigan v. Long*, 463 U.S. at 1041. Under these circumstances, Evans' failure contemporaneously to object on Sixth Amendment grounds to the prosecution's use of the prior transcript poses no bar to this Court's review of the merits of this claim.

he spent most of his time in court with Judge Kent, and worked for Judge Kent "whenever he was on the bench." (App. 108a).

As Judge Kent's courtroom clerk, Mr. Brown was responsible for what he termed some "real important" work, including: swearing witnesses, marking exhibits, swearing juries, administering the voir dire, and taking verdicts. (App. 108a). In addition, Mr. Brown frequently discussed pending cases with Judge Kent; and during trial delays or while awaiting verdicts, he would also discuss, "for several hours on end," a range of other topics with the Judge. (App. 109a, 110a).

Since entering the private practice of law, Mr. Brown has maintained a professional and personal friendship with Judge Kent. Mr. Brown has continued to discuss "broad general" topics with the Judge; and has socialized with Judge Kent on occasion. (App. 110a-111a).

On May 19, 1986, Judge Kent issued a letter opinion (App. 3a), followed by an order (App. 14a-15a), rejecting the remainder of Evans' claims and dismissing his habeas petition. Judge Kent found that the performance of his former courtroom clerk had been "skillful and well above the standard of competence required of defense counsel in a criminal case." (App. 10a).

Evans timely petitioned the Virginia Supreme Court for review of Judge Kent's decision. On February 26, 1987, the Supreme Court of Virginia issued a two-sentence order, finding that "there is no reversible error in the judgment complained of," and dismissing Evans' appeal. (App. 16a). This petition followed.[15]

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[15] Each of the four arguments in the instant petition was explicitly raised below—both before the state habeas judge (Judge Kent) and the Virginia Supreme Court—and was rejected. None of these claims has been presented previously to this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WHOLLY IGNORES THE IMPORTANT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL RECOGNIZED IN *EVITTS*.

In *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), this Court held that where a State provides an appeal of right, "the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant effective assistance of counsel on [his] appeal." *Evitts*, however, did not present an opportunity for this Court to define the parameters of "effective assistance" on appeal, and the Court specifically reserved judgment on that question.[16] At the same time, the Court noted that the numerous state and lower federal courts that had recognized a right to effective assistance of appellate counsel had "diverge[d] widely in the standards used to judge ineffectiveness, the remedy ordered, and the rationale used." *Id.* at 398 n.9. Since *Evitts*, state and lower federal courts have continued to struggle with these questions.[17]

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[16] "We . . . need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. *Cf. Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984)." *Evitts v. Lucey*, 469 U.S. at 392.

[17] *Compare Beavers v. Lockhart*, 755 F.2d 657, 660-61 (8th Cir. 1985) *and Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985) (assuming *Strickland* standard applies) *with Watson v. United States*, 508 A.2d 75, 86 (D.C. App.), *rehearing en banc granted, judgment vacated*, 514 A.2d 800 (D.C. App. 1986) (performance of appellate counsel ineffective "if it is so clearly prejudicial to substantive rights as to jeopardize the very fairness and integrity of the appeal proceeding.") Also *compare Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985) (failure to raise substantial claims on appeal may constitute ineffectiveness even where counsel competently raises other, non-frivolous claims) *with State v. Boyer*, 103 N.M. 655, 712 P.2d 1, 4 (N.M. App. 1985) (finding effective assistance of counsel on appeal where "counsel finds a non-frivolous ground and vigorously argues it"). *See also People v. Bailey*, 141 Ill. App. 3d 1090, 490 N.E.2d 1334, 1343 (Ill. App. 1986) (counsel's failure to raise

This case is dramatic proof that at least some of the lower courts have failed either to understand or correctly to apply the important principles announced in *Evitts*. Granting certiorari in this case would allow the Court to provide needed guidance on this important, unresolved question.

In the instant case, there cannot be any doubt that the Virginia courts either misunderstood or wholly ignored *Evitts*. Thus, they sanctioned—without providing an opinion, explanation, or reasoning—appellate conduct that fell far short of effective assistance under any reasonable constitutional standard of review. The stark fact of this case is that while Messrs. Brown and Long represented Evans, the Commonwealth secured a conviction and death sentence against him based on false conviction records, and then defended that conviction successfully on appeal for the next year. As the Commonwealth has long urged, throughout the course of the appellate proceedings Evans' counsel knew, or should have known, that the evidence supporting their client's death sentence was false. (*See* App. 81a-85a). According to the Commonwealth, defense counsel were explicitly informed of the erroneous convictions by the prosecutor's disclosures at

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substantial claims on appeal is ineffective only if his appraisal of the merits of those claims is "patently wrong"). Similarly, although the Virginia Supreme Court has recently recognized the right of an indigent criminal defendant to effective assistance of counsel on appeal, *Dodson v. Virginia Dept. of Corrections*, Record No. 860252, slip op. (April 24, 1987), it refused to apply that right in this case, or even to articulate why that right was inapplicable here.

Lower courts attempting to apply *Strickland* to claims of ineffective assistance on appeal have also shown confusion over the appropriate standard for judging prejudice. *Compare Bell v. Lockhart*, 795 F.2d 655, 657 n.7 (8th Cir. 1986) (counsel's failure to follow procedural rules that resulted in forfeiture of right of appeal may warrant new opportunity to appeal, regardless of the merits of the appeal) *with Davila v. State*, 718 S.W.2d 350, 352 (Tex. App. Amarillo 1986) (although counsel's incompetence precluded any appeal, no ineffectiveness under *Strickland* because appeal would not have been successful).

the end of the penalty phase of the trial, and later by the pre-sentence report. (App. 81a-82a). Whether this information actually alerted Evans' counsel to the falsity of Commonwealth Exhibits 19-21 is beside the point. At a minimum, counsel had a "duty to make [a] reasonable investigation," *Kimmelman v. Morrison*, 106 S. Ct. 2574, 2589 (1986), to determine the true nature of Evans' prior conviction record—just as habeas counsel did shortly after Evans' first certiorari petition was denied.

Notwithstanding the ample time from Evans' sentencing (on June 1, 1981) through the denial of his certiorari petition (on March 22, 1982), and the pressing need to rebut the Commonwealth's repeated assertions, in both the Virginia Supreme Court and this Court, that Evans' prior conviction record demonstrated his "future dangerousness" (App. 87a-92a), counsel for Evans did nothing to investigate, challenge, or correct the erroneous records. If the rights articulated by this Court in *Evitts v. Lucey* are to mean anything, they must mean, at a minimum, that an indigent defendant in a capital case is entitled to representation by counsel who, when alerted to serious error in his client's death sentence, will investigate the matter vigorously and with dispatch. To countenance the performance of counsel in this case and deem it reasonable, as the court below did (App. 1a, 10a), is to reduce the right of effective assistance on appeal to a mere "form of words." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

This Court has held that during trial effective assistance means more than simply filing pleadings on time and obeying procedural rules; to be effective, counsel must also investigate, and where appropriate, competently litigate important claims. *See Kimmelman v. Morrison*, 106 S. Ct. at 2588-89.[18] The lower courts need a clear instruction that that same principle governs the right to effec-

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[18] *Cf. McMann v. Richardson*, 397 U.S. 759, 770 (1970); *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion) (Counsel have a duty to "make an independent examination of the facts, circumstances, pleadings and law involved . . . .")

tive assistance on appeal—particularly where the defendant is an indigent facing a capital sentence.[19]

Evans' counsel's failure to investigate or challenge their client's conviction records throughout the course of the appeal was clearly "deficient" under the standard articulated by this Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Moreover, counsel's deficient performance prejudiced the defense, since there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. While *Strickland* held that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*,[20] there is no need for conjecture in the instant case about the probable outcome had Evans' counsel acted diligently after receiving the pre-sentence report on June 1, 1981. That report explicitly stated that the most serious prior "conviction" used to secure Evans' death sentence was not a conviction at all. (App. 58a). If counsel had challenged Evans' death sentence then, or at any time during the year-long appellate process, the sentence would necessarily have been vacated, as indeed it later was. (App.

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[19] The lower courts, including the Virginia Supreme Court, have already recognized that the "seriousness of the offense and the severity of the [possible] punishment" are relevant factors in assessing the adequacy of counsel's performance. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399, 403 (1984); *Stanley v. Zant*, 697 F.2d 955, 962-63 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); *Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002-03 (1983). *Cf. Beck v. Alabama*, 447 U.S. 625, 637 (1980) (the risk of error that may be acceptable in a non-capital case "cannot be tolerated in a case in which the defendant's life is at stake," since "there is a significant constitutional difference between the death penalty and lesser punishments . . . .").

[20] More recently this Court has stated that "a defendant need not establish that [his] attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland* . . . ." *Nix v. Whiteside*, 106 S. Ct. 988, 999 (1986).

34a-35a).[21] Counsel's failure to raise (or even to investigate) this ground for relief prejudiced Evans by depriving him of the certain reversal of his sentence during his first appeal.

Counsel's failure has had grave, lasting consequences; it has meant, literally, the difference between life and death. The timing of counsel's failure was of paramount importance to the outcome of Evans' case. Shortly before the Virginia Supreme Court ruled on Evans' appeal, it held in another case, *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (Oct. 16, 1981), that under Virginia's death penalty statute as it stood at that time, a capital defendant whose sentence was set aside could not be resentenced to death. That ruling was in effect two months later when the Virginia Supreme Court decided Evans' direct appeal, on December 4, 1981. It remained in effect for a full year after this Court denied certiorari (in March 1982), until Virginia amended its death penalty statute on March 28, 1983. *See supra* notes 9, 10. If Evans' counsel had raised on appeal the errors underlying his conviction (as competent counsel would have done), there cannot be the slightest doubt about the outcome: Evans' death sentence, like Patterson's, would have been commuted to life imprisonment. Counsel's failure to provide effective assistance on appeal denied Evans the benefit of the law as it existed at the time and resulted in a second sentencing, which otherwise would not have been permitted.[22]

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[21] This Court has squarely held that criminal sentences based on unconstitutional or otherwise invalid conviction records violate due process and cannot stand. *United States v. Tucker*, 404 U.S. 443, 447-48 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). The Commonwealth itself recognized that principle when it ultimately conceded error. (App. 48a-49a).

[22] The second sentencing procedure did not and could not cure the prejudice suffered by Petitioner for the obvious reason that a second sentencing would not have been permitted had counsel

II. THE COURT BELOW COUNTENANCED CONDUCT BY COUNSEL THAT FELL FAR BELOW THE STANDARDS SET BY THIS COURT, IN THAT COUNSEL FAILED TO CHALLENGE THE PROSECUTION'S FALSE AND HIGHLY PREJUDICIAL SUMMATION.

At the close of the evidence in the guilt phase of Evans' trial, the Commonwealth's Attorney misled the jury in an extremely material area by stating twice: "Two witnesses said [Evans] had nothing to lose; he'd killed people in North Carolina; he'd absolutely nothing to lose." (App. 56a). In fact, Evans had not "killed people" before and there was no evidence that he had. The prosecutor's argument left the jury with the impression that Evans was a multiple murderer who would likely kill again. It also suggested that the prosecutor knew of evidence, not before the jury, that would substantiate that charge. Moreover, the prosecutor's misstatement directly flouted two earlier instructions by the court not to speculate about the existence of such "evidence." (App. 53a, 55a). That defense counsel permitted these misstatements to go unchallenged is incredible, in light of the fact that they were improper, untruthful, and extremely prejudicial. Counsel had an obligation to object to the prosecutor's false and prejudicial remarks, or at least to request a cautionary instruction from the court. It was abject error to have done neither.

This Court has long held that a state prosecutor's improper, prejudicial and deliberate misstatements of fact concerning material evidence before the jury may deprive a criminal defendant of the right to a fair trial

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effectively represented Evans on his first appeal. *Cf. Evans II*, 471 U.S. at 1029 ("[T]he State's continued, knowing use of false evidence during the direct appeal and petition for certiorari, and its failure to disclose this misconduct, constituted egregious conduct that seriously harmed Evans.") (Marshall, J., dissenting from denial of certiorari) (footnote omitted); *id.* at 1028 (the "remedy" of "a new sentencing hearing free from the taint of false evidence . . . was inadequate to undo the harm suffered by Evans.").

guaranteed by the Fourteenth Amendment. *See Miller v. Pate*, 386 U.S. 1, 6-7 (1967). *Cf. Berger v. United States*, 295 U.S. 78, 84-85 (1935) (reversing a federal conviction, where the federal prosecutor "was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; . . . [and] of assuming prejudicial facts not in evidence . . . ."). More recently, the Court has revisited the thorny question of prosecutorial misconduct during closing argument, but in a far different context than the one presented here.[23] The Court has not, to our knowledge, ever addressed the application of its *Strickland* test in a capital case where the defendant's counsel sat mute, while the prosecutor misstated critical evidentiary facts in his summation.[24] This case squarely raises that important question.

In this case, counsel's failure to challenge or even address the prosecutor's inflammatory misstatement of the evidence was clearly "deficient" under the standard of performance articulated in *Strickland*, 466 U.S. at 687. The court below misunderstood *Strickland* and incorrectly characterized counsel's error as a tactical judgment. (App. 13a). The court reasoned that, since the trial

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[23] *Darden v. Wainwright*, 106 S. Ct. 2464 (1986); *United States v. Young*, 470 U.S. 1 (1985).

[24] Neither *Darden v. Wainwright* nor *United States v. Young* involved a collateral attack on the competence of counsel in failing to object to the prosecutor's improper summation. Counsel in those cases either "invited" the prosecutor's misconduct, *Young*, 470 U.S. at 11-12, or effectively responded to it in rebuttal. *Darden*, 106 S. Ct. at 2473. More importantly, although the prosecutor's argument at issue in those cases included improper personal attack, statements of opinion concerning the credibility of the witnesses, and comments reflecting an emotional reaction to the case, *see Darden*, 106 S. Ct. at 2471-72 & nn.5-12; *Young*, 470 U.S. at 4-6; it did not involve an effort to "manipulate or misstate the evidence," *Darden*, 106 S. Ct. at 2472; *see Young*, 470 U.S. at 4-6. That is the one critical area of misconduct that this Court has previously stated can fatally undermine a verdict. *See Miller v. Pate*, 386 U.S. at 6-7; *Berger v. United States*, 295 U.S. at 84-85.

judge had already admitted the inmates' hearsay testimony over defense counsel's objection, a further objection to the prosecutor's closing argument "would have been overruled" and would have "increased the jury's awareness" of the damaging evidence. (App. 13a). That conclusion is patently wrong; and the Virginia Supreme Court's failure even to review its validity is persuasive evidence of the need for further guidance from this Court.

Contrary to the suggestion of the court below, the prosecutor's statement was not a summation of the existing evidence, but instead, a flagrant mischaracterization of it that invited the jury to disregard the court's earlier instructions and conclude that Evans had in fact "killed people in North Carolina." The prosecutor's repeated, calculated misstatement of the evidence not only violated Evans' federal right to a fair trial, *see Miller v. Pate*, 386 U.S. 1 (1967), but was also reversible error under Virginia law.[25] No risk of highlighting unfavorable inmate testimony could possibly outweigh the risk of permitting the jury erroneously to believe that the defendant was a multiple murderer. Even if counsel believed it tactically unwise to interrupt the prosecutor's argument, counsel could, "[a]t the very least," have sought "a bench conference . . . out of the hearing of the jury . . . and an appropriate instruction . . . ." *United States v. Young*, 470 U.S. at 13-14. Counsel's failure to take *any* corrective action cannot be excused as a "tactical judgment," when the tactic was based on apparent ignorance of the facts or law, and in any event contra-

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[25] The law on prosecutorial misstatements in Virginia is clear: telling the jury that a defendant has committed multiple murders, when there is no such evidence in the record, is harmful error. *See, e.g., Hutchins v. Commonwealth*, 220 Va. 17, 255 S.E.2d 459, 461 (1979); *Artis v. Commonwealth*, 213 Va. 220, 191 S.E.2d 190, 195 (1972); *McLane v. Commonwealth*, 202 Va. 197, 116 S.E.2d 274, 281 (1960).

vened "sound trial strategy." *Strickland*, 466 U.S. at 689. *See Kimmelman v. Morrison*, 106 S. Ct. at 2588.

Counsel's failure was also highly prejudicial to Evans. The prosecutor's statement that Evans had "killed" or admitted to killing people in North Carolina was not simply an unauthorized "matter of opinion," but a " 'consistent and repeated misrepresentation' " of crucial evidence that could "profoundly impress a jury and . . . have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974) (quoting *Miller v. Pate*, 386 U.S. at 6). The prosecution's case had essentially been to suggest that Evans was a man who would "try any means possible to escape" from prison. (App. 53a). The suggestion that Evans was a multiple murderer had the intent and effect of impressing on the jury that Evans had a much stronger motive to escape than anything demonstrated by the evidence. This misstatement would have been particularly persuasive because, unlike the inmate hearsay testimony on which much of the prosecution's case rested, it "carrie[d] with it the imprimatur" of the Commonwealth. *United States v. Young*, 470 U.S. at 18-19. *See Berger v. United States*, 295 U.S. at 88-89; *Donnelly v. DeChristoforo*, 416 U.S. at 651-52 n.* (Douglas, J., dissenting). Under these circumstances, there is more than a "reasonable probability that, but for counsel's unprofessional errors," the jury would have reached a different result. *Strickland*, 466 U.S. at 694.

III. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION CONCERNING VIRGINIA'S PRACTICE OF SUBSTITUTING DRAMATIZED TRANSCRIPT TESTIMONY FOR LIVE TESTIMONY AT CAPITAL RESENTENCING HEARINGS.

For more than a decade the Virginia Supreme Court has explicitly authorized a procedure by which prosecuting attorneys are permitted to introduce at capital resentencing hearings transcript testimony from earlier

proceedings, without demonstrating that the witnesses whose testimony is used are unavailable to appear in person.[26] This longstanding practice, used in the instant case, violates the Confrontation Clause of the Sixth Amendment to the United States Constitution and conflicts with the decision of at least one other state court.[27] With bifurcated trials and resentencing hearings becoming more common in capital cases, it is imperative that the lower courts receive clear instruction on the procedural rights of criminal defendants in such proceedings.

This case provides a particularly compelling example of the inherent dangers and unfairness when the prosecution ignores those rights. The Commonwealth secured a guilty verdict against Evans in April 1981 largely on the basis of adverse, hearsay testimony from witnesses incarcerated with Evans on the night before the shooting. At Evans' resentencing in January 1984, a new jury—which had had no prior contact with the case—was impanelled to determine whether there was a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society . . . ." Virginia Code § 19.2-264.2(1) (1983). The prosecution again relied, as it had in 1981, on the same inmate witnesses to prove that Evans had said he had "nothing to lose" by attempting escape, and that he would "try any means possible to escape." (App. 53a; *see supra* note 2). But instead of presenting the live testimony of those witnesses, as it had at the guilt trial three years earlier, the Commonwealth designated actors to read from portions of the 1981 transcript. In reliance on long-settled decisions of the Virginia Supreme Court (*see* App. 49a-50a, and *supra* notes 14, 26), the Commonwealth made no effort to demonstrate that the inmates whose

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[26] *See Fogg v. Commonwealth*, 207 S.E.2d at 850 (1974); *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734, 736 (1972); *Snider v. Cox*, 212 Va. 13, 181 S.E.2d 617, 618 (1971).

[27] *See Tichnell v. State*, 290 Md. 43, 427 A.2d 991, 997, 1000-01 (Md. 1981).

testimony it chose to dramatize were unavailable to testify in person before the new jury. This procedure denied Evans the opportunity to confront or cross-examine the inmate witnesses on whose testimony his second death sentence rested.

This Court has long held that at the guilt phase of a criminal trial the Confrontation Clause of the Sixth Amendment guarantees the accused the right to "confront" an adverse witness and to compel that witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980), (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). Thus, in a series of cases involving criminal trials, this Court has prohibited states from substituting the stale transcript of a witness' testimony for live testimony when the witness is "available to testify." *See Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968). Moreover, the Court has placed upon the prosecutor the burden to prove that such witnesses are unavailable and has held that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.*, 390 U.S. at 724-25.

The same principles should invalidate a sentence based on the procedure used by the Commonwealth in this case. At a capital sentencing hearing, where the crucial issue of life and death is determined, it is imperative that the jury be given the opportunity to see the defendant's accusers and to weigh their testimony as to aggravating factors in light of their demeanor and credibility. Moreover, the defendant should have the right, denied in this proceeding, to examine the adverse witnesses live before the new jury to determine, at a minimum, their present recollection of events upon which a sentence of death may ultimately rest. Though the constitutional right may yield in appropriate circumstances where a witness is no

longer available, a state should not be permitted to render that right nugatory at its own behest by the simple expedient of reading stale transcript testimony, without any showing of a "good faith effort" to produce the witnesses live at trial.[28]

At least one other state court, dealing with facts almost identical to those found here, has struck down as unconstitutional a procedure identical to the one used here by Virginia. *See Tichnell v. State*, 290 Md. 43, 427 A.2d 991, 997, 1000-01 (Md. 1981).[29] It is important to resolve at the earliest opportunity the conflict between

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[28] The Commonwealth's purpose in substituting the "testimony" of actors for that of inmates is only too plain. By doing so, the Commonwealth was able to shield its inmate witnesses, whose demeanor and testimony might seem inherently suspect, from the crucible of cross-examination before a jury that had never seen them. In addition, by presenting prior testimony already frozen in time, the prosecution effectively denied Evans' new defense counsel any opportunity to cross-examine those adverse witnesses, including any effort to test their recollection at the time of the resentencing to determine whether it remained consistent with their earlier testimony. Not only did those witnesses not appear before the resentencing jury, but over Evans' objections, the resentencing judge expressly prohibited any challenge to portions of their earlier testimony. (*See supra* note 12). This is a particularly startling and unfair result, in light of Evans' claims that his former counsel (who cross-examined the inmate witnesses when they appeared live in 1981, before a different jury) had provided ineffective assistance at that time.

[29] The facts in *Tichnell* were almost identical to those in the present case: the defendant was convicted of shooting a police officer based upon the testimony of witnesses. The State later relied on this testimony to establish aggravating circumstances at the penalty stage. When the defendant's first sentence was vacated and a new sentencing jury impanelled, the prosecution presented the transcript of the previous guilt trial to the new jury. Citing the Sixth Amendment decisions of this Court, the Maryland Court of Appeals overturned the second sentence. The Court noted that "the demeanor and credibility of the State's witnesses . . . was of critical importance to the sentencing jury in determining whether aggravating circumstances existed . . . ." *Id.* at 1000.

these two courts, since the question is likely to arise repeatedly in the future. This Court should make clear, as it has in other contexts, that in capital resentencing proceedings states may not pick and choose the circumstances under which their prosecutors will present the live testimony of adverse witnesses.

IV. THE REFUSAL OF THE HABEAS JUDGE BELOW TO RECUSE HIMSELF UNDER CIRCUMSTANCES INDICATING THE LIKELIHOOD OF HIS BIAS AGAINST THE PETITIONER VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Shortly before the habeas hearing, counsel for Petitioner learned that E. Blair Brown, the attorney whose competence was a principal issue in the hearing, had served for three years as the courtroom clerk of the Judge assigned to hear Evans' habeas petition. Petitioner promptly requested the Judge to recuse himself, but he denied the motion. Judge Kent's failure to recuse himself deprived Petitioner of the "neutral and detached" decisionmaker at his habeas hearing that due process requires. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). This Court should grant certiorari to affirm that in post-conviction proceedings as elsewhere a State may not arbitrarily deny fundamental liberty interests without providing due process of law. It is particularly important to vindicate that principle in a case such as this, in which the Commonwealth's admitted misconduct—in deliberately securing a death sentence on the basis of evidence known to be false—has already undermined public trust in the integrity of the judicial process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

There is, to be sure, no constitutional requirement that the Commonwealth of Virginia provide a system of post-conviction review. But having chosen to establish such a system, Virginia must "act in accord with the dictates of the Constitution—and, in particular, in accord with

the Due Process Clause." *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Given the nature of the adjudicatory tasks to be performed by Judge Kent, and the long-term effects that such proceedings typically have on a defendant's ability to assert constitutional rights, due process required that he be "neutral and detached." *Morrissey v. Brewer*, 408 U.S. at 489. All the circumstances here indicate that, regardless of Judge Kent's subjective belief that he could act impartially (App. 105a), it was unlikely that he could be a truly "neutral" decisionmaker. The claim he was asked to resolve required him to pass judgment on the effectiveness, competence, and veracity of a former long-time employee who had been entrusted with the responsibilities attendant to judicial office.[30]

In the present instance, as is typical where a decisionmaker's impartiality is challenged, there is no objective way of demonstrating Judge Kent's bias in favor of his former employee. Nevertheless, because " 'justice must satisfy the appearance of justice,' " this Court has previously stated that " 'every procedure which would offer a possible temptation to the average man as a judge . . .

[30] Virginia's Canons of Judicial Conduct provide that "[a] judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Canons of Judicial Conduct, Part 6, Section III, Canon 3 (C)(a) (1986). In *United States v. Ferguson*, 550 F. Supp. 1256, 1259-60 (S.D.N.Y. 1982), Judge Weinfeld, faced with a situation analogous to the present case, held that a judge should recuse himself if "a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality." In that case Judge Weinfeld did recuse himself from a trial in which his former law clerk (who had held that position for only one year) had been a witness before the grand jury on a peripheral matter. *Id.* at 1257, 1259-60. The fact that a judicial action is widely regarded by other judges as improper and violates Judicial Canons of Ethics is of course not determinative of its constitutionality; nevertheless, such facts can provide strong evidence that the challenged action offends the Constitution as well as a sense of judicial ethics. *See Nix v. Whiteside*, 106 S. Ct. 988, 994-97 (1986).

not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (citations omitted). Despite Judge Kent's subjective belief that he could act impartially, "experience teaches that the probability of actual bias" in such a situation—in which the Judge was required to assess the veracity and competence of a former colleague—"is too high to be constitutionally tolerable." *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975). At the very least, it is clear that this is an area in which the lower courts could benefit from guidance by this Court.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the order and opinion of the Circuit Court of Alexandria, Virginia.

Respectfully submitted,

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May 1, 1987

STATUTORY APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Amendment XIV, § 1 provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Virginia Code § 18.2-31 provides:

> § 18.2-31 *Capital Murder defined; punishment.*
>
> The following offenses shall constitute capital murder . . . .
>
> (f) The willful, deliberate and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties.

Virginia Code § 19.2-264.2 provides:

> § 19.2-264.2 *Conditions for imposition of death sentence.*
>
> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .

Virginia Code § 19.2-264.3 provides:

> § 19.2-264.3 *Procedure for trial by jury.*
>
> A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence . . . .
>
> C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . . .
>
> If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

Virginia Code; Rules of Supreme Court of Virginia, Part 6, § III, provides:

> Canons of Judicial Conduct, Part 3(C)(a); Disqualification:
>
> A judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.